

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Griffin, P.J., and Meter and Kelly, J.J.

SHARDA GARG,

Plaintiff-Appellee,

v

MACOMB COUNTY COMMUNITY MENTAL
HEALTH SERVICES, A GOVERNMENTAL
AGENCY OF MACOMB COUNTY,

Defendant-Appellant.

Supreme Court No. 121361

Court of Appeals No. 223829

Macomb County Circuit Court
No. 95-3319-CK

**AMICI CURIAE BRIEF OF THE MICHIGAN CIVIL RIGHTS
COMMISSION AND THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS**

Michael A. Cox
Attorney General

Susan I. Leffler (P29081)
Assistant Attorney General for Law

Ron D. Robinson (P35927)
Suzanne D. Sonneborn (P55511)
Assistant Attorneys General
Civil Rights and Civil Liberties Division
Cadillac Place, 10th Floor
3030 West Grand Boulevard, Suite 10-650
Detroit, MI 48202
(313) 456-0200
Attorneys for Amici Curiae Michigan Civil
Rights Commission and Michigan
Department of Civil Rights

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether a plaintiff may, under reasonable circumstances, establish a *prima facie* case of retaliation under either of the two theories presented to the trial court.
- II. Whether the "continuing violations" doctrine of *Sumner v Goodyear Tire & Rubber Co* should be preserved in its entirety or, alternatively, modified in a manner consistent with of the language of the statute of limitations, MCL 600.5801(1), and the United States Supreme Court's decision in *National Railroad Passenger Corp v Morgan*, 536 US 101 (2002).

STANDARD OF REVIEW

Amici Curiae adopt the Standard of Review as set forth in plaintiff-appellee Sharda Garg's Brief on Appeal.

STATEMENT OF PROCEEDINGS AND FACTS

Amici Curiae adopt the Statement of Proceedings and Facts as set forth in plaintiff-appellee Sharda Garg's Brief on Appeal.

ARGUMENT

INTRODUCTION

The Michigan Civil Rights Commission (MCRC) was established by Article 5, § 29 of the Michigan Constitution of 1963, which provides in pertinent part:

It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination.

Pursuant to its constitutional authority, the MCRC is statutorily mandated to, among other things, promulgate, amend, or repeal rules to carry out the Elliott-Larsen Civil Rights Act, (CRA), MCL 37.2101 *et seq.*, and "promote and cooperate with a public or governmental agency as in the commission's judgment will aid in effectuating the act and the state constitution of 1963." MCL 37.2601(f)(h).

Likewise, the Michigan Department of Civil Rights (MDCR) is statutorily mandated to, among other things:

Receive, initiate, investigate, conciliate, adjust, dispose of, issue charges, and hold hearings on complaints alleging a violation of this act, and approve or disapprove plans to correct past discriminatory practices which have caused or resulted in a denial of equal opportunity with respect to groups or persons protected by this act. [MCL 37.2602(c).]

Given the agencies' constitutional and statutorily-prescribed commitment to ensuring the enjoyment and equal protection of the civil rights of all Michigan citizens, the MCRC and the MDCR (hereafter "amici curiae") have a significant interest in two of the four issues on which the Court sought briefing in its grant of leave to appeal. First, amici curiae have a significant interest in the issue of whether plaintiff established a *prima facie* case regarding either of her two theories of retaliation. Specifically, amici curiae submit that the Court of Appeals' recognition that physical resistance may reasonably constitute a protected activity under the opposition

clause of MCL 37.2701(a) is consistent with legislative intent, the remedial purpose of the CRA and, specifically, § 701 Michigan precedent, and federal precedent interpreting § 701's federal counterpart, Title VII's § 704(a). Amici curiae further submit that the Court of Appeals correctly recognized that the temporal proximity between a plaintiff's protected activity and subsequently denied promotion(s), for purposes of determining a causal link between the two, must be considered relative to when the opportunity for promotion first presented itself.

Amici curiae also have a significant interest in preserving the continuing violations doctrine of *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), in its entirety and assert that an abrogation of the doctrine would detrimentally burden plaintiffs, particularly those subjected to ongoing patterns of hostile work environment harassment abuse, as well as burden administrative agencies and the courts with complaint activity, as each alleged civil rights violation must be timely documented or risk being statutorily barred. Alternatively, amici curiae have a significant interest in the modification of the doctrine in a manner consistent with the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in *National Railroad Passenger Corp v Morgan*, 536 US 101; 122 S Ct 2061; 153 L Ed 2d 106 (2002). In *Morgan*, the Supreme Court recognized that otherwise untimely acts comprising a hostile work environment are not time-barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the applicable time period. Amici curiae submit that the use of the continuing violations doctrine in cases involving acts of hostile work environment harassment is in furtherance of the intent and purpose of the language of MCL 600.5805(1), as well as the CRA. In this regard, MCRC and MDCR oppose amicus curiae Attorney General's suggestion that this Court entirely abrogate the continuing violations doctrine – a step neither occasioned by the facts of this case, nor

appropriate given that the CRA closely mirrors its federal counterpart and, as in *Sumner*, is often interpreted by relying upon federal precedent interpreting Title VII.

For these reasons, amici curiae submit that this Court should: (1) uphold the Court of Appeals' determinations that a plaintiff may, under reasonable circumstances, sufficiently establish a *prima facie* case of retaliation where: (a) a plaintiff's reasonable physical resistance to a violation of the CRA constitutes a protected activity under the opposition clause of MCL 37.2701(a); and (b) the absence of temporal proximity between a plaintiff's protected activity and promotion denials need not negate a causal connection; and (2) preserve the continuing violation doctrine of *Sumner* in its entirety or, alternatively, modify the doctrine in a manner consistent with MCL 600.5805(1) and the United States Supreme Court's decision in *Morgan* regarding untimely incidents comprising a hostile work environment.

I. A plaintiff may, under reasonable circumstances, establish a *prima facie* case of retaliation under either of the retaliation theories presented to the trial court.

In *Deflaviis v Lord & Taylor*, 223 Mich App 432; 566 NW2d 661 (1997), the Court set forth the elements necessary to establish a retaliation claim under § 701 of the CRA:

[A] plaintiff must show 1) that he engaged in protected activity; 2) that this was known by the defendant; 3) that the defendant took an employment action adverse to the plaintiff; and 4) that there was a causal connection between the protected activity and the adverse employment action. [*Deflaviis, supra* at 436.]

In this case, the plaintiff based her retaliation claim on two separate theories, both of which the Court of Appeals concluded a reasonable jury could differ on whether plaintiff sufficiently established the elements of a *prima facie* case. For the reasons set forth below, amici curiae support and request that this Court affirm the Court of Appeals' necessary determinations that: (a) under reasonable circumstances, opposition to a violation of the CRA under § 701 may include physical resistance; and (b) the determination of temporal proximity between a plaintiff's protected activity and subsequent denials of promotions, for purposes of establishing a causal

connection, is not based solely on the component of time where, as here, plaintiff was denied the first promotion she sought after her protected activity.

A. The determination that, under reasonable circumstances, opposition to a violation of the CRA under § 701 may include physical resistance is consistent with the intent and purpose of the CRA and § 701, as well as published Michigan and federal precedent.

As to plaintiff's first theory of retaliation, the Court of Appeals held in pertinent part:

Plaintiff sufficiently established a jury question with regard to these elements by way of her evidence, concerning the slugging incident, that (1) she had observed Habrick pulling an employee's bra strap while walking behind her and pulling an employee's underwear elastic while seated behind her; (2) around the same time, in 1981, plaintiff was walking along a hallway when she felt somebody touching her back; (3) she turned around and swung at this person; (4) the person was Habkirk, one of her supervisors; (5) after the slugging incident, Habkirk became cold toward her; (6) a coworker told her that Habkirk did not like her; (7) plaintiff did not receive the first available promotion, in 1983, after the slugging incident, despite being qualified for the position; (8) plaintiff was denied eighteen total promotions between 1983 and 1997, despite being qualified for the positions; (9) individuals less qualified than plaintiff received promotions while plaintiff did not; and (10) Habkirk remained in her chain of command throughout the years.

[R]easonable jurors could conclude that plaintiff, by slugging [her supervisor], sufficiently "raise[d] the specter" that she opposed a violation of the civil rights act. *Mitan v Neiman Marcus*, 240 Mich App 679, 682; 613 NW2d 415 (2000); see also *McLemore v Detroit Receiving Hosp & University Medical Center*, 196 Mich App 391, 396; 493 NW2d 441 (1992). Moreover, the different treatment plaintiff received after the slugging incident sufficed to establish causation. [*Garg v Macomb County Community Mental Health*, Court of Appeals No. 223829 (March 29, 2002) at 2, 3 (Emphasis added).]

In effect, the Court of Appeals held that protected activity under the opposition clause of § 701 may, under reasonable circumstances, include physical resistance to a violation of the Act – an issue of first impression in Michigan.

1. Legislative intent of § 701.

This Court reiterated the rules of statutory construction in *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002):

When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted, and the statute must be enforced as written.' Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. [*Id.* (Citations omitted).]

Section 701 of the CRA provides in part that a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701(a).]

According to this language, the CRA prohibits retaliation or discrimination against a person because that person has (1) "opposed a violation" of the Act; or (2) "participated" in a proceeding brought pursuant to the Act, by either making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing. However, while the latter portion of § 701(a) – referred to as the "participation clause" – expressly defines participation in a proceeding brought pursuant to the Act (as "either making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing"), the "opposition clause" provides no such express guidance as to that which constitutes opposition.

As this Court has previously observed, when defining common words or phrases that have not acquired a unique meaning at law, it is appropriate to consult a lay dictionary because "the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary and not a legal dictionary." *Robinson v City of Detroit*, 462 Mich 439, 457; 613

NW2d 307 (2000). Accordingly, "oppose" is defined as **"to contend with in speech or action; resist; withstand."** *Webster's New World Dictionary, Second College Edition*, at 998. (Emphasis added.)¹

Thus, based on sound principles of statutory construction, specifically the common and approved usage of the term "oppose" as being "to contend with in speech or action; to resist," amici curiae submit that the Court of Appeals' determination that protected activity under the opposition clause of § 701 may include physical resistance to a violation of the Act is a determination that reflects the plain and ordinary meaning of the term "oppose," a term heretofore left undefined by the Legislature in MCL 37.2701(a).

2. Purpose of the CRA and § 701.

When reasonable minds may differ with respect to the meaning of a statute, the courts must look to the object of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purpose of the statute. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). See also *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 77; 503 NW2d 645 (1993) ("We also consider that remedial statutes, such as the Whistleblowers' Protection Act, are to be liberally construed, favoring the persons the Legislature intended to benefit.")

The overall purpose of the CRA is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Deflaviis, supra* at 440, citing *Radtko v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993). The specific purpose of § 701 is to protect access to

¹ This Court has previously defined the term "oppose" in the context of Michigan's "resisting and obstructing" statute, MCL 750.479. See *People v Vasquez*, 465 Mich 83, 89-90; 631 NW2d 711 (2001) ["'Oppose' is defined as 'to act against or furnish resistance to; combat.'" *Random House Webster's College Dictionary* (1991) at 949].

the machinery available to seek redress for civil rights violations and to protect operation of that machinery once it has been engaged. *Id.*

Amici curiae submit that a recognition that protected activity under the opposition clause of § 701 may reasonably include physical resistance to a violation of the Act is in furtherance of the overall purpose of the CRA and the specific purpose of § 701. To be sure, to conclude otherwise – that such informal opposition to a violation of the Act does not trigger the anti-retaliation provision – would in fact serve to *deny* access to those individuals who, because of a legitimate fear of retaliation, may avoid the formal mechanisms of redress available under the participation clause (i.e., making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing).

3. Michigan precedent interpreting the CRA and § 701.

Published Michigan precedent interpreting the CRA supports the Court of Appeals' recognition that, under reasonable circumstances, physical resistance to a violation of the CRA may constitute protected activity pursuant to the opposition clause of § 701.

This Court has previously observed that a reasonableness inquiry, accomplished by objectively examining the totality of the circumstances, is necessary to fulfill the purposes of the CRA. *Chambers v Tretco*, 463 Mich 297, 319; 614 NW2d 910 (2000), citing *Radtke, supra* at 394 ("We hold that whether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment.")

Moreover, in *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992), the Court rejected the notion that an employee's vague

expression of concern regarding discrimination did not rise to the level of a protected activity under the opposition clause:

In *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312-1314 (CA 6, 1989), the federal court of appeals decided that the Civil Rights Act did not protect from retaliation an employee who had merely expressed concern to his employer about possible discrimination. We strongly disagree with this interpretation of the act. Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely effect an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs. We will not interpret the act to allow employers to peremptorily retaliate against employees with impunity. Doing so would be contrary to our state's policy of protecting employees who are about to report a suspected violation of law. [*McLemore, supra* at 396 (Emphasis added).]

The *McLemore* Court's recognition that opposition to a suspected violation of the CRA may be vague and/or lack formal invocation of the CRA's protection has been adopted in subsequent published decisions. See, e.g., *Mitan v Neiman Marcus*, 240 Mich App 679, 681-682; 613 NW2d 415, n 3 (2000) ("Although plaintiff did not specifically allege a violation of her civil rights under the CRA, an expression of concern to an employer regarding possible discrimination may be sufficient to apprise the employer of a possible claim under the CRA.")

In short, amici curiae submit that the Court of Appeals' recognition in this case that physical resistance may reasonably be deemed protected opposition activity is consistent with and contemplated by the reasonableness inquiry approach to the CRA that was recognized in *Radtke* and *Chambers*, as well as the "vagueness of the charge or the lack of formal invocation" language of *McLemore*.

4. Federal precedent interpreting § 701's federal counterpart.

While this Court has made clear that, in interpreting the CRA, it is not compelled to follow federal court interpretations of the CRA's counterpart federal statute, Title VII of the Civil Rights Act of 1964, 42 USC 2000e, amici curiae submit that such guidance is appropriate in this

instance, particularly given that § 701 "clearly tracks" § 704(a) of Title VII. *Chambers, supra* at 917; *Deflaviis, supra* at 440, citing *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312 (6th Cir 1989). Indeed, just as the Court in *Deflaviis* was asked to address a question of first impression in Michigan (whether a former employee may bring an action for unlawful retaliation under the CRA), this Court is faced with a similar task and should look to federal precedent for assistance in addressing the question of whether protected activity under the opposition clause of § 701 may, under reasonable circumstances, include physical resistance to a violation of the Act. *Deflaviis, supra* at 437, citing *McCalla v Ellis*, 180 Mich App 372, 377-378; 446 NW2d 904 (1989).

Accordingly, amici curiae submit that, in interpreting the CRA's opposition clause, this Court should find persuasive the following observation made by the Sixth Circuit in *Booker*:

Courts are required to balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel. . . . The requirements of the job and the tolerable limits of conduct in a particular setting must be explored." *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); see also *Moze v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984). [*Booker, supra* at 1312.]

Likewise, amici curiae assert that, in *Johnson v University of Cincinnati*, 215 F3d 561, 579-580 (2000), the Sixth Circuit's analysis of the scope of Title VII's opposition clause supports the Court of Appeals' determination herein that physical resistance may reasonably be construed as opposition to a violation of the CRA. In *Johnson*, the Court noted:

Under Title VII, an employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation of Title VII. The Equal Employment Opportunity Commission ("EEOC") has identified a number of examples of "opposing" conduct which is protected by Title VII, including complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union,

and co-workers. EEOC Compliance Manual, (CCH) P 8006. The EEOC has qualified the scope of the opposition clause by noting that the manner of opposition must be reasonable, and that the opposition be based on "a reasonable and good faith belief that the opposed practices were unlawful." *Id.* In other words, a violation of Title VII's retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. [*Johnson, supra.* (Footnote omitted) (Emphasis added).]

See also, *Warren v Ohio Dep't of Pub Safety*, 24 Fed Appx 259, 265 (6th Cir 2001) ("Under the opposition clause, the person opposing apparently discriminatory practices must have a good faith belief that the practice is unlawful. There is no qualification on whom the individual doing the complaining may be or on who the party to whom the complaint is made.").

In this case, amici curiae urge this Court to employ the Sixth Circuit's balancing approach to the opposition clause and recognition that the manner of opposition must be reasonable. Amici curiae further urge this Court to apply the balancing approach to this case and assert that, in doing so, this Court can and should affirm the Court of Appeals' determination that, under reasonable circumstances, physical resistance to a violation of the CRA may constitute protected activity pursuant to the opposition clause of § 701.

B. The determination of temporal proximity between a plaintiff's protected activity and subsequent denials of promotions, for purposes of establishing a causal connection, is not based solely on the component of time where, as here, plaintiff was denied the first promotion she sought after her protected activity.

In concluding that plaintiff established the elements of a retaliation claim under her second theory, the Court of Appeals held in pertinent part:

Defendant contends that plaintiff failed to demonstrate a causal connection between the adverse employment actions and the discrimination grievance because the first denial of a promotion occurred over 1 ½ years after the grievance. We agree with defendant that in discussing causation in retaliation cases, the case law emphasizes temporal proximity. However, one must keep in mind that according to her testimony, plaintiff was denied *the first promotion that she sought* after the filing of the grievance. Accordingly, viewing the evidence in the light most favorable to plaintiff, reasonable jurors could have concluded that a

causal connection existed. [*Garg, supra* at 3 (Emphasis in original) (Citations omitted).]

Amici curiae agree with the Court of Appeals' implicit recognition that, while temporal proximity alone may be insufficient to establish a causal connection, a determination of temporal proximity, or lack thereof, between a protected activity and an adverse employment action should not be limited to how little or how much time separates the two actions.

In *West v General Motors Corp*, 469 Mich 177, 184-187; 665 NW2d 468 (2003), this Court held that to establish discrimination-based retaliation, a plaintiff "must show something more than merely a coincidence in time between protected activity and adverse employment action." *Id.* at 186. To establish a causal connection, the plaintiff must show that his participation in the protected activity was a "significant factor" in the employer's adverse employment action, not merely that there was a causal link between the two events. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a discriminatory or retaliatory basis. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697; 568 NW2d 64 (1997); *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 661; 653 NW2d 625 (2002).

Thus, courts have generally considered close temporal proximity between a protected activity and an adverse action to be indicative of a causal connection – and, in doing so, the relevant focus has thus far been how close in time the adverse action followed the protected activity. However, as observed by the Sixth Circuit in *Jackson v RKO Bottlers of Toledo, Inc*, 743 F2d 370, 378, n 4 (6th Cir 1984), a causal connection may also be established absent this close proximity where other circumstantial evidence supports such an inference:

For example, the trial court relied in part on the length of time between defendant's filing his discrimination charge on July 12, 1978, and his discharge on December 1, 1980, making it unlikely that the two incidents were causally related. See *Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass. 1976), aff'd 545 F.2d 222 (1st Cir. 1976). This reliance makes it clear that the trial court ignored evidence introduced by plaintiff, which if believed, would raise an inference that defendant had engaged in a pattern of retaliatory conduct beginning soon after plaintiff filed discrimination charges.

Amici curiae submit that the Sixth Circuit's observation in *Jackson* lends persuasive support to the Court of Appeals' recognition herein that the determination of close proximity is necessarily relative to the circumstantial evidence at hand. To be sure, notwithstanding that plaintiff's first promotion denial occurred over 1-½ years after her June 1987 protected activity (grievance alleging racial discrimination), plaintiff presented sufficient evidence to establish a causal connection between the two events, including, but not limited to, plaintiff's supervisor's knowledge of plaintiff's protected activity and the fact that plaintiff was denied the first promotion she sought following her protected activity, as well as other promotions for which plaintiff was qualified and sought between 1989 and 1997. Thus, while it may be insufficient to establish a causal connection based on close temporal proximity alone, the absence of such proximity need should not automatically negate a causal connection provided otherwise sufficient evidence exists.

II. The continuing violations doctrine of *Sumner v Goodyear Tire & Rubber Co* should be preserved or, alternatively, modified in a manner consistent with the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in *National Railroad Passenger Corp v Morgan*.

A. The continuing violations doctrine of *Sumner* should be preserved.

Amici curiae agree with and support plaintiff-appellee's argument that the instant case does not justify an abrogation of *Sumner's* continuing violations doctrine. Amici curiae submit that the doctrine can and should be preserved or, alternatively, modified in a manner consistent with the language of MCL 600.5805(1) and the *Morgan* decision.

This Court is familiar with the *Sumner* decision and, therefore, a lengthy recitation of the facts and analysis is unnecessary except to highlight the following portion of *Sumner*:

The nature of harassment is that it ceases once the intent to harass ends. It does not provide notice of subsequent neutrally initiated injuries.

The mere existence of the continuing harassment is, however, insufficient if none of the relevant conduct occurred within the limitation period. *Evans, supra*. Similarly, the mere existence of some vague or undefined relationship between the timely and untimely acts is an insufficient basis upon which to find a continuing violation. Therefore, the central questions are whether Sumner's dismissal was a present violation and whether it was sufficiently connected to the harassment. [*Sumner, supra* at 539 (Emphasis added).]

In concluding that there was substantial evidence to indicate that the very purpose of his employer's harassment was "to provoke plaintiff into an action for which he could be terminated," the *Sumner* Court opined:

[W]e think that to interpret the limitation period of the statute in a way that would allow racial provocation to be isolated from its possible ultimate intended purpose when the accomplishment of that purpose is timely would be to allow and encourage the worst kinds of blatant discrimination that the act intended to eradicate. [*Sumner, supra* at 384.]

Amici curiae recognize that the three-year statute of limitations set forth in MCL 600.5805(9) for claims brought pursuant to the CRA "was designed to eliminate stale claims" and that "it is the general rule that exceptions to statutes of limitation are to be strictly

construed." *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984). Amici curiae submit, however, that the *Sumner* Court recognized the necessity of a narrow exception to the statute of limitations for otherwise untimely discriminatory acts that are related to a discriminatory act within the applicable statute of limitations which, without such an exception, would go unchecked and without eradication, a result clearly counter to the remedial purpose of the CRA. Thus, amici curiae assert that the continuing violations doctrine should remain a recognized exception to the three-year statute of limitations for claims brought pursuant to the CRA.

Moreover, stare decisis, while not an "inexorable command," is "generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v Detroit*, 462 Mich 439, 463, 464; 613 NW2d 307 (2000) (quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998)). The Court considers four factors in determining whether to overrule precedent: (i) whether the earlier case was wrongly decided; (ii) whether the decision defies "practical workability"; (iii) whether reliance interests would work an undue hardship; and (iv) whether changes in the law or facts no longer justify the questioned decision. *Pohutski v City of Allen Park*, 465 Mich 675, 694; 641 NW2d 219 (2002) (citing *Robinson, supra* at 464).²

All four factors support the preservation of the continuing violations doctrine set forth in *Sumner*. *Sumner* was not wrongly decided. Indeed, the consistent use of and reliance on the continuing violations doctrine in CRA claims for nearly the past twenty years suggests that the

² While *Robinson* and *Pohutski* both concerned statutory interpretation, *Robinson* relied on *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), a case interpreting a constitutional provision, for its description of the factors.

factors recited by the *Sumner* Court as having initially militated against a strict application of the statute of limitations to Title VII claims remain present today:

First, Title VII is a remedial statute whose purpose is to root out discrimination and make injured parties whole. Second, employees are generally lay people, who do not know that they must act quickly or risk losing their cause of action. An employee may fear reprisal by the employer, or may refer the matter to a union, which may not take any action within the limitation period. Employees may also delay filing their complaints in the hope of internal resolution or simply to give the employer a second chance. Third, and most importantly, *many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place.* One might say that they unfold rather than occur. [*Sumner* at 525-526 (Emphasis added).]

Amici curiae submit that such concerns continue to exist with respect to claims brought pursuant to the CRA. In this regard, defendant-appellant's only proffered justification for overruling *Sumner* – that "[i]n the nearly two decades since *Sumner* was decided, the public in general, and employees in particular, have become far more cognizant of their rights to be protected from discrimination and retaliation" – is wholly unsupported and without factual basis. Brief for Defendant-Appellant at 44.

Finally, amici curiae submit that there has been no change in **Michigan** law that would call into question the continued validity of *Sumner*. Notwithstanding the recent United States Supreme Court's decision in *Morgan*, this Court has repeatedly held that Michigan is neither bound by nor compelled to interpret Michigan's CRA in accordance with the federal courts' interpretations of its federal counterpart statute, Title VII. *Haynie v Dep't of State Police*, 468 Mich 302; 664 NW2d 129 (2003); *Chambers v Trettco, Inc.*, 463 Mich 297 (2000).

B. Alternatively, the continuing violations doctrine of *Sumner* should be modified in a manner consistent with the language of the statute of limitations, MCL 600.5805(1), and *Morgan*.

Should this Court determine that the preservation of *Sumner's* continuing violations doctrine is unwarranted in light of the statutory language of MCL 600.5805(1) and *Morgan*, amici curiae alternatively submit that this Court should only modify the doctrine in a manner consistent with MCL 600.5805(1) and *Morgan*.

In *Morgan*, the Court distinguished between hostile environment claims and discrete acts of discrimination and concluded that, while the former may still be actionable despite the untimely nature of portions of the claim, "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period." *Morgan, supra* at 112, citing *Evans, supra* at 558. The Court explained the distinction with respect to hostile environment claims as follows:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative affect of individual acts.

* * *

It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. [*Morgan, supra* at 115, 117 (Emphasis added) (Citations omitted).]

In this regard, the *Morgan* decision is consistent with *Sumner* in that both decisions acknowledge that the inherent nature of hostile work environment harassment claims involving related conduct occurring over time requires a recognition that all acts comprising such a claim are timely, so long as at least one act falls within the statutory time period. Accordingly, while this Court is not compelled to follow federal court interpretations of its counterpart federal statute, doing so in

this instance with respect to that portion of *Morgan* regarding the timeliness of hostile work environment claims would not represent a significant change in Michigan's approach to determining the applicability of the continuing violations doctrine of *Sumner*. *Chambers, supra* at 314.

As for discrete acts of discrimination, however, the Court in *Morgan* noted as follows:

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. n7

n7 Because the Court of Appeals held that the "discrete acts" were actionable as part of a continuing violation, there was no need for it to further contemplate when the time period began to run for each act. . . . There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue.
[*Morgan, supra* at 115 (Emphasis added).]

Thus, with respect to untimely "discrete acts" of discrimination, *Morgan* represents a divergence from *Sumner* by excluding such conduct from the application of the continuing violations doctrine. However, as noted above, in concluding that each discrete act comprises an "unlawful employment practice," whereas a hostile environment made of several individual acts comprises but one "unlawful employment practice," the Court in *Morgan* reserved for another occasion resolution of whether, in determining the timeliness of a single discriminatory act, "the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered." *Id.* In short, should this Court adopt *Morgan*, amici curiae submit that the issue of the time at which a single discriminatory act accrues, not reached in *Morgan*, provides

this Court with the opportunity to do so in the instant case in a manner consistent with *Sumner* and MCL 600.5805(1).

MCL 600.5827 provides that a claim accrues under MCL 600.5805 "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." In *Stephens v Dixon*, 449 Mich 531; 536 NW2d 755 (1995), this Court held that the "wrong" is done when the plaintiff is harmed, not when the defendant acted. Thus, the determination of the timeliness of a single discriminatory act should necessarily be the time at which the plaintiff is harmed by the discriminatory act. Such a determination in the instant case would render timely all acts which caused harm to the plaintiff after July 21, 1992. (Plaintiff's complaint was filed on July 21, 1995.)

For these reasons, amici curiae submit that this Court should preserve the continuing violations doctrine of *Sumner* or, alternatively, modify the doctrine in a manner consistent with MCL 600.5805(1) and *Morgan*.

- 1. Amicus curiae Attorney General's suggestion that this Court also adopt the dissent in *Morgan* should be rejected where (i) the case before the Court does not present such an opportunity; and (ii) doing so would particularly harm victims of hostile work environment harassment.**

Amici curiae oppose amicus curiae Attorney General's unsupported suggestion that this Court entirely abrogate the continuing violations doctrine by adopting the dissent in *Morgan*, which would hold that the applicable statute of limitations limits "all actions brought under Title VII, including those alleging discrimination by being subjected to a hostile working environment." *Morgan, supra* at 129. Specifically, the Attorney General suggests the following:

Although not specifically presented with a hostile work environment claim in this case, this Court should take the opportunity to address the issue and follow the reasoning set forth by Justice O'Connor and hold that hostile work environment claims based on discriminatory acts occurring outside of the three-year period of limitations are barred. [Amicus Brief of Michigan Attorney General at 37 (Emphasis added).]

As the Attorney General concedes, this Court does not, with the instant case, have before it a hostile work environment claim that would occasion adoption of such a ruling.³ Nonetheless, the Attorney General broadly asserts that this Court should surpass the factual limitations of this case and of *Morgan's* holding "because the same legal arguments may be applied to hostile work environment claims, and because of the potential practical effect a bifurcated decision may have on the characterization of future suits." *Id.* at 42.

Amici curiae respectfully submit that the Attorney General's proposal would wreak havoc in hostile work environment harassment claims, which involve ongoing patterns of abuse that are especially well-suited to the continuing violations doctrine. Sociological and psychological research has demonstrated that the least frequent recourse by victims of sexual harassment is filing a formal complaint or a lawsuit. Since the Attorney General's proposal would require an employee to file a lawsuit within three years of being harassed – or be barred from recovering for all conduct before the limitations period – employers would escape liability for most sexual harassment if the proposal were adopted by this Court.

Two major academic articles extensively analyze women's responses to sexual harassment: *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 Journal of Social Issues 117 (1995), by Fitzgerald, Swan and Fischer, and *Sociological Perspectives on Sexual Harassment and Workplace Dispute*

³ Indeed, Defendant concedes that *Morgan's* "exception to the limitation on the continuing acts doctrine would have no factual application to this matter." Brief for Defendant-Appellant Macomb County Community Mental Health Services at 48.

Resolution, 42 Journal of Vocational Behavior 102 (1993), by Lach and Gwartney-Gibbs. See also Note, *Notice in Hostile Environment Discrimination Law*, 112 HarvLRev (1999). The Fitzgerald and Lach articles, in turn, review over 100 other sexual harassment studies.

The Fitzgerald article concludes, "By far the *most infrequent response* is to seek institutional/organizational relief (i.e., notifying a supervisor, bringing a formal complaint, and filing a lawsuit). Victims apparently turn to such strategies as a last resort when all other efforts have failed." *Fitzgerald, et al, supra* at 121 [italics added]. The most common responses, according to Fitzgerald, are the least confrontational ones: "victims are more likely to talk with a supervisor than to file a formal complaint, and legal claims are by far the least common response – truly the 'court of last resort.'" *Id.* Even among women who labeled their experience as harassment, one national study found that 74 percent responded by telling the harasser to stop while only 12 percent filed a complaint of any kind. *Id.* at 122.

The Lach article similarly reports that women prefer to resolve harassment disputes through informal means, such as stalling or ignoring the harasser; confronting the harasser either politely or more directly; or reporting the harasser to a higher authority. Only a very small number used "formal complaint channels," presumably internal complaint procedures. *Lach, et al, supra* at 110.

The most common reason for not formally reporting harassment is fear, according to both articles – fear of retaliation, of not being believed, of hurting one's career, or of being humiliated. Sadly, retaliation is common and the most assertive employees suffer the greatest costs. One study of female state employees reported that 62 percent of those who complained of sexual harassment experienced retaliation, including lowered job evaluations, denial of promotions, and being transferred or fired. In a survey of sexual harassment of federal workers conducted by the United States Merit Systems Protection Board, one-third of employees who filed formal claims

said it only "made things worse." According to a study of sexual harassment in the Navy, one-third of harassment victims reported they were humiliated in front of others when they complained. Another survey concluded that women who responded assertively to harassment had more negative outcomes in terms of their jobs, their emotional well-being, and their health. *Fitzgerald, et al, supra* at 122-123. *Lach et al, supra* at 110-111.

Retaliation by potential future employers is also a serious problem. In a 1992 survey of 1100 California companies, 75-80 percent of the responding employers admitted they would not give equal consideration to job applicants who had sued their former employers for wrongful termination, sexual harassment, unequal pay or failure to promote, even if the suits were valid and justifiable. Applicants who were in the midst of litigation fared even worse; 87 percent of the respondents would not consider the person equally with other candidates. *The Litigation Stigma: Lawsuits Come Back to Haunt*, 70 HR Focus No 2, p 19 (February 1993), by Spoon & Ellis.

Thus, the Attorney General's suggestion that this Court adopt *Morgan's* dissent and hold that the applicable statute of limitations limits all actions brought under the CRA, including those alleging discrimination by being subjected to a hostile working environment, would have a devastating effect on victims of hostile work environment harassment, whether that harassment be of a sexual or racial nature. It would deny relief for events which were part of an ongoing pattern of discriminatory treatment but were not the subject of an immediate lawsuit. Employees who tried to work out problems informally with their employers would face the very real danger that a court would decide they had waited too long and had forfeited their right to relief for the earlier incidents because they knew or should have known the initial conduct was discriminatory. And because the creation of a hostile work environment depends on the accumulation of many

incidents, excluding the earlier incidents would make it far more difficult for the plaintiff to establish liability for the later events that were within the limitations period.

Moreover, should an employee be precluded from preserving a cause of action under any circumstances, unless that employee brought his or her complaint to the attention of the employer, as the Attorney General has suggested, amici curiae submit that the MDCR would be inundated with complaint activity, a result for which the MDCR lacks sufficient case management resources.⁴ Indeed, were the Attorney General's proposed standard adopted and applied to plaintiff in the instant case, plaintiff would have been required to formally protest every denial of promotion or other act of retaliation or hostility in order to insure against possible further retaliation and preserve a cause of action. Amici curiae submit that such an outcome would be an aberration of the intended remedial purpose of the CRA.

Finally, if the employee did file a discrimination charge and pursue litigation at the time of the first discriminatory act, that conduct, standing alone, might not survive summary judgment if the challenged actions did not "substantially interfere with the employee's employment or create an intimidating, hostile, or offensive work environment." *Chambers, supra* at 311; see also *Morgan, supra* at 536 US 115 ("A single act of harassment may not be actionable on its own."). Ultimately, under the Attorney General's proposed standard, hostile work environment harassment victims would run the real risk of being both too early and too late.

For these reasons, amici curiae assert that this Court should reject the Attorney General's invitation to this Court to reach beyond the facts of the case before it by ruling that the applicable

⁴ In 2003, the MDCR docketed 1948 complaints and informally processed approximately another 3,210 early resolutions. MDCR 2003 Annual Report at 14 (available at http://www.michigan.gov/documents/CR_ann_rpt03_96002_7.pdt). Thus, in practical terms, were every concern forced to become a complaint and the MDCR averaged only three separate incidents per complaint over a period of time, the MDCR could conceivably reach a caseload in excess of 10,000 cases per year.

statute of limitations bars all untimely claims brought under the CRA, including those claims alleging a hostile work environment comprised of both timely and untimely related incidents.

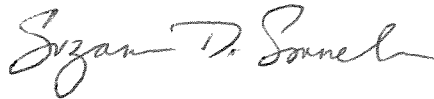
CONCLUSION AND RELIEF SOUGHT

This Court should: (1) uphold the Court of Appeals' determinations that a plaintiff may, under reasonable circumstances, sufficiently establish a *prima facie* case of retaliation where: (a) a plaintiff's reasonable physical resistance to a violation of the CRA constitutes a protected activity under the opposition clause of MCL 37.2701(a); and (b) the absence of temporal proximity between a plaintiff's protected activity and promotion denials need not negate a causal connection, particularly where, as here, the plaintiff was denied the first promotion she sought following her protected activity; and (2) preserve the continuing violation doctrine of *Sumner v Goodyear Tire & Rubber Co* in its entirety or, alternatively, modify the doctrine in a manner consistent with the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in *National Railroad Passenger Corp v Morgan* regarding untimely incidents comprising a hostile work environment.

Respectfully submitted,

Michael A. Cox
Attorney General

Susan I. Leffler (P29081)
Assistant Attorney General for Law



Ron D. Robinson (P35927)
Suzanne D. Sonneborn (P55511)
Assistant Attorneys General
Civil Rights and Civil Liberties Division
Cadillac Place, 10th Floor
3030 West Grand Boulevard, Suite 10-650
Detroit, MI 48202
(313) 456-0200
Attorneys for Amici Curiae Michigan Civil
Rights Commission and Michigan
Department of Civil Rights

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Attorneys/Sonneborn/Garg/Brief